90-181

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

ANDERS MIGDALECK,
PETITIONER,

v.

United States of America,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

A.

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN HOLDING 1) THAT DEFENSE COUNSEL FAILED TO PROPERLY OBJECT TO A JURY INSTRUCTION ON ACCOMPLICE TESTIMONY, AND 2) THAT THE TRIAL COURT'S FAILURE TO *SUA SPONTE* INSTRUCT THE JURY ON HOW TO EVALUATE EXCULPATORY ACCOMPLICE TESTIMONY DID NOT CONSTITUTE PLAIN ERROR.

B.

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN 1) HOLDING THAT THE INTRODUCTION OF EVIDENCE OF FRAUDULENT INFLATION OF INSURANCE CLAIMS DID NOT CONSTITUTE A CONSTRUCTIVE AMENDMENT OR IMPERMISSIBLE VARIANCE, AND 2) FAILING TO ADDRESS DEFENDANT/PETITIONER'S ALLEGATION OF ERROR WITH RESPECT TO A VIOLATION OF FEDERAL RULES OF EVIDENCE 403 AND 404(b).

C.

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN HOLDING THAT THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR AND DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT/PETITIONER'S MOTION UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 33 FOR THE REASON THAT THE GUILTY VERDICT RENDERED BY THE JURY WAS MANIFESTLY AGAINST THE GREAT WEIGHT OF THE EVIDENCE.

D.

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN HOLDING THAT THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY VOUCHING FOR THE CREDIBILITY OF THE PROSECUTION IN THE JURY'S PRESENCE, THEREBY DEPRIVING DEFENDANT/PETITIONER OF A FAIR AND IMPARTIAL TRIAL.

LIST OF ALL PARTIES IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee.

v.

ANDERS MIGDALECK;
OCELIA PERKINS;
DONALD J. MCQUEEN;
JOYCE SCOTT;
PAMILA H. WILLIAMS; and
STELLA WARE,
Defendants/Appellants.

Nos. 88-1953; 1954; 1955; 1956; 88-2031; 88-2110

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ANDERS MIGDALECK, by and through his attorney, THOMAS A. HOWARD, petitions herein for a Writ of Certiorari to review the decision rendered in the United States Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing of the Circuit Court's Opinion affirming Petitioner's Judgment of Conviction in the United States District Court for the Eastern District of Michigan, Southern Division, on ten counts of Mail Fraud, in violation of 18 U.S.C. sec. 1341.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, filed March 7, 1990, affirming the District Court's conviction, is reprinted in full as Appendix A. The opinion of the Sixth Circuit has not been recommended for full text publication.

The order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing of Opinion affirming Petitioner's conviction, filed May 1, 1990, is reprinted in full as Appendix C.

JURISDICTION

The Opinion and Decision appealed from was filed and entered on March 7, 1990, by the United States Court of Appeals for the Sixth Circuit. The Petition for Rehearing of the March 7, 1990, Opinion affirming Petitioner's Conviction was filed and entered by the Sixth Circuit on May 1, 1990. Jurisdiction is invoked pursuant to 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULE

The Constitutional provisions involved herein are the Fifth and Sixth Amendments to the United States Constitution. The Fifth Amendment states, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .

The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Statutory provision herein involved is 18 U.S.C. sec. 1341, which states:

> **Frauds and swindles**
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal

Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 20 years, or both. (As amended Aug. 9, 1989, Pub.L. 101-73, Title IX, sec. 961(i), 103 Stat. 500.)

The Federal Rule of Criminal Procedure herein involved is Fed.R.Crim.P. 33, which states:

New Trial

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

On or about January 6, 1988, Petitioner, Anders Migdaleck, was charged with nineteen counts of Mail Fraud, contrary to 18 U.S.C. sec. 1341, and four counts of interstate transportation of securities taken by fraud, contrary to 18 U.S.C. sec. 2134. The Indictment named nine other co-defendants. It alleged that defendants engaged in eight schemes to defraud insurance companies by filing insurance claims for damages caused by eight arson fires, which defendants allegedly procured.

The Indictment alleged that Petitioner, as owner of Town and County Builders and Anders Construction Company, was the primary facilitator of the schemes to defraud. It contended that Petitioner paid cash to three arsonists, Al Meredith, Jr., Adar Hassan and Willie Weems, to set the fires through a "programmer," Al Meredith, Sr., who arranged the arsons.

Anita Vianueva Sackett, a licensed public adjuster, was charged an active participant in the Indictment. Ms. Sackett operated the Damon Adjusting Company which negotiated and submitted insurance claims to insurance companies on behalf of various homeowners. Prior to trial, Ms. Sackett pled guilty to Counts V and VI of the Indictment, in exchange for an agreement that if she testified against Petitioner, her incarceration would be no greater than eighteen months (Tr. 797-799).

On June 15, 1988, following a jury trial before United States District Court Judge Horace Gilmore, Petitioner was found guilty of ten counts of Mail Fraud. He was acquitted on the remaining nine Mail Fraud counts, as well as on all of the four interstate transportation of securities counts. On September 9, 1988, Petitioner was sentenced to twenty years imprisonment, and ordered to pay $171,127.00 in fines and restitution.

The prosecution's case-in-chief against Petitioner was based upon the testimony of five government witnesses. Each of these five witnesses agreed to testify in return for total immunity and/or sentence leniency. Three of the five government witnesses totally exonerated Petitioner of any wrongdoing.

Al Meredith, Sr. testified that he worked for Town and Country Builders. He solicited fire repair contracts and was paid by Petitioner on a commission basis (Tr.5-7). At the time of trial, Al Meredith, Sr. was incarcerated, having served three of a four to ten years prison sentence for three prior arson convictions (Tr.4). He agreed to cooperate with Federal authorities only after he was told that he would be charged with certain arsons, then under investigation; that his son, Al Meredith, Jr. was giving information to the authorities; and that he would receive full immunity if he testified (Tr. 184-185; 272). By his own admission, Al Meredith, Sr. received $2-3,000 in payments from the government during his incarceration. Al Meredith, Sr. testified that although he had been involved in as many as 700 arsons, he never became directly or personally involved in arsons due to his high level of integrity (Tr.154,157). His trial testimony, however, was wholly without integrity. It was totally uncorroborated by any witnesses. Regarding all but one of the eight arsons, he testified that he was approached by one of the three arsonists and informed of a "programmed" fire. He stated that, in each case, he obtained cash from Petitioner to give to the arsonist to purchase arson materials for the fire. Interestingly, there were never any witnesses to these alleged payments from Petitioner to Al Meredith, Sr.

His trial testimony was impeached on all material points. Defense counsel demonstrated that Al Meredith, Sr.'s trial testimony was the direct opposite of his trial testimony given in a December 20, 1985, Detroit Recorders Court arson trial (Tr. 226-330). The Recorder's Court trial had essentially the same parties, to wit: Petitioner, Al Meredith, Sr., Al Meredith, Jr., Adar Hassan and Willie Weams. Petitioner was acquitted of any wrongdoing. Al Meredith, Sr. testified, in Recorders Court, that he never spoke with Petitioner about any illegal activity (Tr. 226). He told the Recorder's Court jury that Petitioner would not accept a fire repair contract if he knew it was an arson. Meredith, Sr. stated that he always presented fire repair contracts to Petitioner as legitimate fires and never, at any time, said a word to Petitioner about arson activities (Tr.226-229). His exculpatory

Recorders Court testimony was completely corroborated by arsonists, Adar Hassan, Willie Weems and Al Meredith, Jr.

Throughout the entire trial and with respect to each of the eight arson incidents, the government's own witnesses, Adar Hassan, Willie Weems and Al Meredith, Jr. unequivocally contradicted the testimony of Al Meredith, Sr. on every material point:

COUNTS I AND II

On January 18, 1983, an arson fire occurred at Donald McQueen's residence on 17245 Westbrook, Detroit, Michigan. Although Petitioner was acquitted of these charges, Al Meredith, Sr. gave the following testimony:

> A. My son came to me and told me he had a fire on Westbrook and he needed some money in order to purchase the material. . . . And I tried to find out as much as I could about it and I found out he really had a fire. I went in the back and told Mr. Migdaleck that I needed some cash money to give Butch, Butch is the same as Al Meredith, Jr., so he could purchase some material for some liquids that he could burn the house down. . .
>
> Q. When you approached Mr. Migdaleck about some money for your son to buy liquids for the fire, did he say anything? Did he do anything?
>
> A. He reached in his pocket and give me cash.

(Tr. 11-13)

In direct contradiction of his own father's testimony, Al Meredith, Jr. testified that the source of the funds for the incendiary materials was not Petitioner (Tr. 404-406).

COUNTS III AND IV

On February 25, 1983, an arson fire occurred at the residence of Ronald Pitts at 18331 Greydale, Detroit, Michigan. Al

Meredith, Sr. testified that his son advised him of his intention to set a fire at the Greydale address. He testified that he, thereafter, "went and got 20 bucks from Andy (Petitioner) to give to Junior so he could set the house on fire." (Tr.32). Al Meredith, Jr.'s testimony was directly contrary to that of his father:

> Q. (Mr. Howard) Now, the next fire you talked about was on Greydale?
>
> A. Yes.
>
> Q. And did you get any money from your father for that fire?
>
> A. *No, I didn't.*

(Tr.406) (emphasis added).

COUNTS V THROUGH IX

On July 27, 1984, an arson fire occurred at Michael White's residence at 14992 Ferguson, Detroit, Michigan. Al Meredith, Sr. testified that he obtained $50 or $100 in cash from Petitioner and gave it to Willie Weems so he could purchase materials to burn the house that night (Tr.34-35). He flatly denied going to the Ferguson address prior to the fire. He stated that he went there only *after* the fire (Tr.35). Willie Weems, testified to a very different version of events. Not only was Al Meredith, Sr. at the Ferguson address *prior* to the fire, but he actively participated in the arson, contrary to his testimony that he never became directly or personally involved in arsons, due to his high level of integrity. Willie Weems testified that he met Michael White and Al Meredith, Sr. at the Town and Country offices. He testified that, thereafter, he and Al Meredith, Sr. drove to a local store and purchased rubbing alcohol to start the fire (Tr. 529-533). Weems testified that Al Meredith, Sr. then drove him to Michael White's home and waited outside while Weems started the fire. (Tr. 536-537).

COUNTS X, XI AND XII

On October 20, 1983, an arson fire occurred at Pamela Hatter William's residence on 18335 Faust, Detroit, Michigan. This was the only fire alleged in the indictment in which Al Meredith, Sr. did not testify as to the source of the funds used to ignite this fire. Petitioner was acquitted on these counts.

COUNTS XIII AND XIV

On May 11, 1983, an arson fire occurred at the home of Ocelia Perkins on 613 Fildew, Pontiac, Michigan. Al Meredith, Sr. testified that he approached Petitioner and stated "we're going to need some money, Mr. Migdaleck, for Junior and Adar Hassan to go burn a house in Pontiac." He stated that Petitioner then reached into his pocket and gave him between $75 and $100, which he, in turn, gave to his son and Adar Hassan (Tr. 55).

Al Meredith, Jr. testified that his father gave him $10 or $15, from his own pocket, in his private office at Town and Country for materials to start the fire. No one else was present in his father's office. Al Meredith, Sr. never left the office to obtain the money from anyone else prior to giving him the money (Tr.407-408).

COUNTS XV THROUGH XX

The arson fire at Doris Lauderdale's home on 2983 Carter, Detroit, Michigan, occurred on January 15, 1983. Al Meredith, Sr. testified that Willie Weems advised him of his intention to set this fire. Al Meredith, Sr. then stated that he approached Petitioner and requested money to give to Willie Weems for the purchase of incendiary materials. He testified that Petitioner gave him money which he then gave to Weems (Tr.57-58). On cross-examination, Al Meredith, Sr. materially altered his testimony. He was uncertain whether he obtained the money from Petitioner. (Tr. 209-210).

Willie Weems testified that Al Meredith, Sr. did not have any advance knowledge of the Carter fire. Weems testified:

> A. He (Al Meredith, Sr.) had gotten the call from the fire department on the radio monitor box and he wanted to know how come I was not moving faster going to the fire that was only a couple blocks away, what was happening, was it empty, was it vacant? He wanted to know, so I didn't tell him nothing. . . . Because I knew something that he didn't know.

(Tr.559). Both Petitioner and Doris Lauderdale were acquitted of these five counts.

COUNTS XXI AND XXII

Petitioner was acquitted on the two counts which involved the March 15, 1983 arson at the home of Joyce Manns. Al Meredith, Sr. testified that prior to the fire, he asked Petitioner for money to give to Adar Hassan for the purchase of incendiary materials. He stated that Petitioner gave him $75 for this purpose (Tr. 61-62, 204-207). Adar Hassan expressly denied that he ever received any money from Al Meredith, Sr. for incendiary materials (Tr. 732).

COUNT XXIII

Petitioner was convicted relative to the arson which occurred at 13908 Thompson, Highland Park, Michigan. Al Meredith, Sr. testified that Petitioner gave him between $50 and $100 to give to Willie Weems to purchase materials for starting the fire (Tr.64). Willie Weams, however, testified that Al Meredith, Sr. was not a party to the planning of this fire and did not give him any money, whatsoever. He stated that "Willie Dale Young and myself got together and pooled our monies together and came up with materials to take care of the claim (Tr. 565).

All three arsonists who testified for the government all gave separate, exculpatory, testimony. Each arsonist's testimony was separately corroborated by the other two arsonists. Each testified

that Petitioner was free of any wrongdoing. Each testified that they presented themselves as legitimate salesmen, selling legitimate fire repair contracts to Petitioner at all times. Each emphasized that it was well known that Petitioner would never knowingly accept a fire repair contract on an arson fire. (Meredith, Jr. Tr. 392-394; Weems, Tr. 580-592; Hassan, Tr. 692-693). Anita Sackett testified that if there was any suspicion that a fire repair contract was the result of arson, Petitioner would insist that she telephone the fire department to verify the legitimacy of the fire (Tr. 818,819).

Each of the three arsonists testified that Al Meredith, Sr.'s reputation for truth and veracity in the community was poor (Weems, Tr. 589-594; Meredith, Jr., Tr. 415; Hassan, Tr. 695-697).

Anita Sackett was the only other government witness, besides Al Meredith, Sr., to give inculpatory testimony, as set forth more fully in Arguments II and III, infra. Her testimony, in no way related to whether Petitioner had knowledge of the arson character of the fires and was unrelated to charges in the Indictment.

On July 22, 1988, Petitioner filed a Motion for New Trial under Fed.R.Crim.P. 33, alleging that the guilty verdict returned against him was manifestly against the great weight of evidence. The trial judge denied this Motion on September 8, 1988, following a court hearing. On September 16, 1988, Petitioner filed a timely Notice of Appeal from his Judgment of Conviction and Sentence. On March 7, 1990, the Sixth Circuit Court of Appeals affirmed Petitioner's conviction. Petitioner timely filed a Request for Rehearing which was denied by the appellate court on May 1, 1990.

ARGUMENT I

THE SIXTH CIRCUIT ERRED IN HOLDING 1) THAT DEFENSE COUNSEL FAILED TO PROPERLY OBJECT TO A JURY INSTRUCTION ON ACCOMPLICE TESTIMONY, AND 2) THAT THE TRIAL COURT'S FAILURE TO *SUA SPONTE* INSTRUCT THE JURY ON HOW TO EVALUATE EXCULPATORY ACCOMPLICE TESTIMONY DID NOT CONSTITUTE PLAIN ERROR.

The trial testimonies of admitted arsonists, Al Meredith, Jr., Adar Hassan and Willie Weems, were entirely exculpatory. The Sixth Circuit's characterization of their testimony as "essentially favorable to Defendant Migdaleck. . ." (March 7, 1990, Opinion p.4a) was a gross understatement. Despite this wealth of exculpatory evidence, the trial judge committed an egregious error by instructing the jury on how it should treat inculpatory testimony, without instructing the jury on how it should treat the substantial exculpatory testimony, under the principles articulated by the United States Supreme Court in *Cool* v. *United States*, 409 U.S. 100, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972) and by the Sixth Circuit Court of Appeals in *United States* v. *Stulga*, 531 F.2d 1377 (6th Cir. 1976).

In *Cool*, petitioner and her husband were arrested after a third individual, named Voyles, passed two counterfiet bills at a local store and then reentered the vehicle in which petitioner and her husband were waiting. *Id.* at 100. At trial, Voyles, the alleged accomplice, gave completely exculpatory testimony as to the petitioner. He stated that petitioner had no knowledge of the presence of the counterfeit bills. *Id.* At trial the judge charged the jury as follows:

> . . . I charge you that the testimony of an accomplice is competent evidence and it is for you to pass on the credibility thereof. If the testimony carries conviction and you are convinced it is true *beyond a reasonable doubt*, the jury should give it the same effect as you would to a witness not in

> any respect implicated in the alleged crime and you are not only justified, but it is your duty, not to throw this testimony out because it comes from a tainted source.

Id. at 102 (emphasis in original).

The *Cool* Court concluded that the implication of this instruction was that "the jury should disregard Voyles' testimony unless it was 'convinced it is true beyond a reasonable doubt.' " *Id.* The Court reversed the petitioner's conviction, holding that "[s]uch an instruction places an improper burden on the defense and allows the jury to convict despite its failure to find guilt beyond a reasonable doubt." *Id.* at 102-103. The Court elaborated on the special need for a proper exculpatory accomplice testimony jury instruction:

> In the next paragraph of his instruction, the judge stated: 'I further instruct you that the testimony of an accomplice may alone and uncorroborated support your verdict of guilty of the charges of the Indictment if believed by you to prove beyond a reasonable doubt the essential elements of the charges in the Indictment against defendants.' In light of the fact that the only accomplice testimony in the case was exculpatory, this instruction was confusing to say the least. But even if it is assumed that Voyles' testimony was to some extent inculpatory, the instruction was still fundamentally unfair in that it told the jury that it could convict solely on the basis of accomplice testimony without telling it that it could acquit on this basis. Even had there been no other error, the conviction would have to be reversed on the basis of this instruction alone.

Id at 1379.

In *Stulga*, the defendant was charged with participation in an unlawful conspiracy and transfer of stolen bonds between three individuals, Garner, Spaniard and Byrnes. *Id.* at 1378. Garner and Spaniard admitted to their involvement in the conspiracy, but gave exculpatory testimony regarding the defendant's alleged involvement in certain aspects of the scheme. *Id.* at 1379.

Defendant chose not to testify at trial. The Court noted that "[i]n view of the fact that Appellant presented no evidence in his defense, the jury's evaluation of the testimony of Garner and Spaniard was pivotal in Appellant's defense." *Id.* at 1379-1380. The *Stulga* trial court gave the following jury instruction:

> There has been testimony in this trial from witnesses whom you may find to have been accomplices. An accomplice is one who unites with another in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participating in the criminal act charged. On the contrary, the testimony of an accomplice alone, if believed by you, may be sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is to be received with caution and weighted with great care. You should not convict a defendant upon the unsupported testimony of an accomplice, *unless you believe that unsupported testimony beyond all reasonable doubt.*

Id. at 1380 (emphasis in original).

The *Stulga* court reversed defendant's conviction. It observed that the above instruction could have confused the jury as to the burden of proof:

> The judge instructed the jury on evaluating an accomplice's inculpatory testimony despite the virtual dearth of inculpatory witnesses who could be considered accomplices, but neglected to instruct the jury as to the appropriate testimony furnished by accomplices. *The lack of precision in the charge could very well have confused the jurors, they might have erroneously concluded that they had to believe the accomplice's exculpatory testimony beyond a reasonable doubt before it support a defense for Appellant.* As the Supreme Court noted in *Cool*, the imposition of such a burden could allow "the jury to convict despite its failure to find guilt beyond a reasonable doubt."

Id. at 1380 (emphasis added).

A comparison of the *Stulga* instruction with the accomplice testimony instruction given in the instant case reveals that the two instructions are essentially the same. They are virtually identical with respect to the critical last phase italicized by the *Stulga* court. The trial court, in Petitioner's case, gave the following instruction on accomplice testimony:

> Now an accomplice is one who unites with another person in the commission of a crime, voluntarily and with a common intent. The testimony of one who asserts by his testimony that he is an accomplice may be received in evidence and considered by the jury even though not corroborated by other evidence and given such weight as the jury feels it should have. You should always keep in mind, however, that such testimony is always to be viewed with caution and considered with great care. You should never convict a Defendant upon the unsupported testimony of an alleged accomplice *unless you believe that unsupported testimony beyond a reasonable doubt.*

(Instructions, Tr. 1627) (emphasis added).

In response to the above jury instruction, counsel for Petitioner voiced the following objection:

> Secondly, I object in connection with the instruction, either the accomplice or the other one where an individual benefits *for the reason that the instruction says that if you believe that accomplice, then you can go ahead and find guilt.* I submit to the court that the appropriate objection, the appropriate aspect of the charge should be that if you believe the evidence of the accomplice, and you feel that *in and of itself* is sufficient to satisfy you that *it is proof of guilt* beyond a reasonable doubt, then you may accept it. . . .

(Tr. 1631) (emphasis added).

On appeal, Petitioner argued, inter alia, that the trial court committed reversible error by failing to give the jury an

instruction on exculpatory accomplice testimony. The Sixth Circuit Court of Appeals affirmed the trial court. In reviewing the content of defense counsel's objection, the Sixth Circuit did not restate the first sentence of Petitioner's objection. It chose to quote only part of the objection, which must be read in its entirety and in context. (See March 7, 1990, Opinion at p.4a).

While the Sixth Circuit clearly recognized that the trial court has a duty to instruct a jury on the standard for evaluating accomplice testimony pursuant to *Cool* and *Stulga*, it concluded, despite the above quoted objection, that these cases were inapplicable to the instant case, because defense counsel failed to make a proper objection under *Cool* and *Stulga*. The Sixth Circuit limited its review to the plain error standard under Fed.R.Crim.P. 52(b), "[c]onsequently, we review this assignment of error under the plain error rule. . . ." (Opinion, p.6a).

Defense counsel did, in fact, record a sufficient objection under *Cool* and *Stulga*. The Sixth Circuit erred in concluding that defense counsel simply asked the court to instruct the jury that it could accept inculpatory testimony if it believed the testimony beyond a reasonable doubt. Defense counsel did not request essentially the same instruction that was ultimately given by the trial court. When read in context, defense counsel sought to segregate the inculpatory testimony of Al Meredith, Sr. from the exculpatory testimony of the other accomplices, Al Meredith, Jr., Adar Hassan and Willie Weems. In seeking to insert a clause in the instruction that the accomplice testimony *by itself* would have to be found by the jury to constitute proof of guilt beyond a reasonable doubt in order to find guilt, defense counsel sought to distinguish the substantial amount of credible, exculpatory, testimony from the highly suspect and incredible testimony of Al Meredith, Sr. Defense counsel's objection addressed the very constitutional concerns identified in *Cool* and *Stulga*.

Even assuming, arguendo, that defense counsel failed to make a proper objection, the court of appeals erred in holding that the omission of the exculpatory instruction did not constitute plain error. In applying the plain error doctrine the court cited

United States v. *Hook*, 781 F.2d 1166, 1172 (6th Cir.), *cert. denied*, 470 U.S. 882 (1986), which set forth the standard for review of a claimed error with respect to jury instructions:

> Since Hook failed to object to the jury instructions at trial, *see*, Fed.R.Crim.P. 30, reversal is only required in this case if the omission of jury instructions constituted "plain error". Fed.R.Crim.P. 52(b). The Supreme Court and numerous federal courts have repeatedly stated that the plain error doctrine is to be used sparingly, only in exceptional circumstances, and solely to avoid a miscarriage of justice. . . .

(*Id.* at 1172-1173)

The appellate court, relying on *Hook*, concluded that "it is manifest that no miscarriage of justice resulted from the court's failure to instruct, sua sponte, on the manner in which the jury might have evaluated the exculpatory accomplice testimony, and defendants cite no authority to the contrary. *See United States*. v. *Vigi*. 515 F.2d 290 (6th Cir.), *cert. denied*, 423 U.S. 912 (1975)." (Opinion at p.6a).

Petitioner cites as fundamental error, the appellate court's failure to recognize that the instructional error was *constitutionally* defective and cannot be described as harmless or otherwise trivialized. The instructional error did not relate to a mere evidentiary or secondary matter. It struck at the heart of the very constitutional concerns central to the *Cool* and *Stulga* rationales. The *Cool* Court emphasized that there is a major difference between instructing a jury with respect to exercising a degree of care or weighing certain evidence and "instructing a jury, as the judge did here, that as a predicate to the consideration of certain evidence, it must find it true beyond a reasonable doubt." *Cool* at 104. In addition to obstructing a defendant's Sixth Amendment right to present the exculpatory testimony of an accomplice, the *Cool* Court also viewed the instruction's effect as causing a defendant to prove his innocence beyond a reasonable doubt, by creating "an artificial barrier to the consideration of relevant defense testimony" in violation of the principles of *In Re Winship*.

397 U.S. 358, 24 L.Ed.2d 160, 90 S.Ct. 179 (1970). *Id.* The Court further held that to impose such a requirement on the defendant was "plainly inconsistent with the constitutionally rooted presumption of innocence. *Id.*

The appellate court failed to recognize the numerous constitutional violations in the challenged instruction and their impact on Petitioner's right to a fair trial. The court's citation of *United States.* v. *Vigi,* 515 F.2d 290 (6th Cir.), *cert. denied,* 423 U.S. 912 (1975), is inapposite. The facts of *Vigi* were twice removed from the instant case. They provide no support for the appellate court's decision. Unlike *Cool,* the *Vigi* accomplice testimony was self-exculpatory. It did not demonstrate the innocence of any of the other co-defendants. The *Vigi* Court specifically stated that "the instruction which the district court gave in the present case was sufficient *in view of the nature of the accomplice testimony.*" *Id.* at 294. (emphasis added).

The nature of the accomplice testimony in the instant case was comparable to *Cool.* The testifying accomplice inculpated himself and exculpated the petitioner. It was also identical to the nature of the accomplice testimony in *Stulga,* in which two of the Government witnesses admitted to participation in criminal acts but exonerated the defendant with respect to the alleged scheme. The *Stulga* court stated that "[i]n view of the fact that Appellant presented no evidence in his defense, the jury's evaluation of the testimony of Garner and Spaniard was pivotal to Appellant's defense." *Stulga, supra,* at 1379. The *Stulga* court concluded that the imprecision in the charge on accomplice testimony, which was virtually identical to the charge in the instant case, could have caused juror confusion and the jurors "might have erroneously concluded that they had to believe the accomplice's exculpatory testimony beyond reasonable doubt before it could support a defense for Appellant." *Id.* at 1380. *See, Cool, supra,* at 103.

No meaningful distinction can be drawn between the nature of the exculpatory accomplice testimony in *Cool* and *Stulga* and the nature of the exculpatory accomplice testimony in the instant case. Nor can meaningful distinction be drawn between the

constitutionally erroneous portion of the instruction in *Cool* and *Stulga* and the challenged portion of the instruction in the instant case. They are virtually identical in their language. If the instruction recognized in *Cool* and *Stulga* was held to be devastating to the defense and fundamentally violative of a number of different rights, the degree of injustice to Defendant in the instant case and the prejudicial impact on his right to a fair trial was not any less devastating, due to the alleged absence of an objection. A violation of *Cool* and *Stulga,* in the manner evidenced in trial in the instant case, which was marked by a wealth of exculpatory accomplice testimony, must be considered a miscarriage of justice and plain error, due to the importance of the constitutional rights undercut by such an improper instruction.

The appellate court never focused on the constitutional aspects of a violation of *Stulga* and *Cool,* as they relate to the plain error doctrine. Their reliance on the nature of the accomplice testimony in *Vigi* was patently misplaced and factually dissimilar to the instant case and *Cool* and *Stulga.* In analyzing whether a jury charge was unconstitutional, the Second Circuit Court of Appeals, in *United States* v. *Calfon,* 607 F.2d 29, 31 (1979), stated that "A nonconstitutional error is generally less 'substantial' within the meaning of Fed.R.Crim.P. 52(b), than a constitutional error, and to be plain error it must therefore "go to the very essence of the case . . ." *Id.* at 31.

Whether analyzed under the "miscarriage of justice" standard of *Hook* or the "very essence of the case" standard of *Calfon,* the nature of the error in the instant case was both unconstitutional and plain.

Courts have consistently recognized that an instruction in violation of *Cool* is of constitutional magnitude, violating the principles of presumption of innocence and reasonable doubt. In *Cupp* v. *Naughten,* 414 U.S. 141, 146-147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973), the Supreme Court expressly recognized that *Cool* exemplified an instance, in which an instruction can rise to the level of constitutional error. The Eleventh Circuit stated that it is important to recognize that "[t]he ultimate question is

whether there is a reasonable possibility that the jury understood the instructions in an unconstitutional manner." *Peek* v. *Kemp*, 784 F.2d 1479, 1489 (11 Cir. 1986), *cert. denied* 100 S.Ct. 737, 44 U.S. 1047; 62 L.Ed.2d 733, *reh denied*, 107 S.Ct. 912, 93 L. Ed.2d 862. In *Gagne* v. *Meachum*, a district court cited *Cupp, supra*, and *Cool*, in stating that "[t]here may very well be situations where a particular erroneous instruction is so offensive as to require reversal without regard to the remainder of the charge." 406 F.Supp. 1213, 1218, n.8 (D. Mass 1978), aff'd 602 F.2d 471, *cert. denied*, 100 S.Ct. 524, 444 U.S. 992, 62 L.Ed.2d 422.

As in *Stulga*, Petitioner did not testify. The jury's evaluation of the exculpatory testimony of all three arsonists was pivotal to Petitioner's defense. Notwithstanding the fact that defense counsel made an objection, the jury was given no basis for evaluating the exculpatory accomplices testimony. Alternatively, Defendant maintains that the constitutional errors were of such magnitude, due to the absence of a proper instruction under *Cool* and *Stulga*, that the trial court's failure to instruct can only be characterized as plain error under Fed.R.Crim.P. 52(b).

ARGUMENT II

THE SIXTH CIRCUIT ERRED IN 1) HOLDING THAT THE INTRODUCTION OF EVIDENCE OF FRAUDULENT INFLATION OF INSURANCE CLAIMS DID NOT CONSTITUTE A CONSTRUCTIVE AMENDMENT OR IMPERMISSIBLE VARIANCE, AND 2) FAILING TO ADDRESS DEFENDANT/PETITIONER'S ALLEGATION OF ERROR WITH RESPECT TO A VIOLATION OF FEDERAL RULES OF EVIDENCE 403 AND 404(b).

Anita Sackett pled guilty to Counts V and VI prior to trial. She agreed to testify against Petitioner in return for a guarantee that her incarceration would not exceed eighteen months (Tr. 798-799). She testified that in September, 1982, she began

working for Town and Country as a secretary. At Petitioner's suggestion, she became a licensed public adjustor to handle the homeowner's losses which came into Town and Country. She set up Damon Adjusting to handle these insurance claims on behalf of various homeowners (Tr. 804-812). Ms. Sackett testified that the building portion of insurance claims, submitted by Damon Adjusting, were inflated as a general practice. She stated that the insurance company regularly cut their claims by 30-50 percent (Tr. 821, 950). She claimed that she instructed Paul Conrad who prepared the estimated damage reports to "go heavy" on the loss in preparing his estimates on the fire at Michael White's property (Tr. 823).

Defense counsel objected to Ms. Sackett's testimony, stating that the issue of inflated claims was not relevant to the charges in the Indictment. (Tr. 819-820). The trial court overruled the objection.

There was absolutely *no* allegation in the Indictment that any of the claims submitted to the various insurers were inflated by any of the defendants. The Mail Fraud counts were all based on the alleged filing and processing of insurance claims through the U.S. Mails with knowledge that the underlying fires were arsons. Moreover, Ms. Sackett, originally a named defendant, did not testify before the grand jury. There is no indication, from the four corners of the Indictment, that the grand jury ever intended to charge any of the defendants, based on an alternative or additional theory of fraudulently inflated claims. It is clear that the Prosecutor advanced an alternate theory of prosecution, which constituted an improper constructive amendment or impermissible variance of the Indictment.

In *Stirone* v. *United States*, 361 U.S. 212; 80 S.Ct. 270; 4 L.Ed.2d 252 (1960), the defendant was indicted for unlawful interference with interstate commerce as a result of causing sand to be moved across state lines to his concrete manufacturing plant. At trial, over defense counsel's relevancy objections, the government introduced evidence of defendant's interference with interstate shipments of steel. *Id.* at 214-214. The Supreme Court

reversed the appellate court's affirmance of defendant's conviction:

> . . . Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. And the addition charging interference with steel exports here is neither trivial, useless, nor innocuous. Compare *Ford* v. *United States,* 273 U.S. 593, 602; *Goto* v. *Lane,* 265 U.S. 393, 402. While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in such an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. Compare *Berger* v. *United States,* 295 U.S. 78. The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge.

Id. at 217-218

Recognizing that the admission of evidence related to the steel shipments ". . . might have been the basis upon which the trial jury convicted petitioner," the Court held that the trial court's action was fatal error for the reason that the petitioner may have been convicted of an offense never charged by the grand jury. *Id.* at 219.

The admission of evidence of inflated claims at trial in the instant case raised the identical dangers recognized by the *Stirone* Court. The admission of this evidence might have been the basis of Petitioner's conviction for ten counts of mail fraud, even though the Indictment makes no mention of inflated insurance

claims and was limited solely to allegations of filing such claims with knowledge of the arson character of the fires.

Counsel for Petitioner objected to the jury instructions on Mail Fraud "for the reason that, in connection with the definition of the scheme, the definition is in the abstract and is misleading to the jury because it does not set parameters. . . ." (Tr 1630). Counsel further objected that the definition of scheme did not adequately limit the jury to evaluating the evidence in accordance with the charges in the Indictment (Tr. 1631). Given the admission of the evidence on inflated claims and the abstract nature of the instructions, the jury may have found Petitioner nonculpable on the question of his knowledge of the arson character of the fire, but still guilty based on the submission of fraudulently inflated insurance claims to the insurers.

In *United States* v. *Beeler*, 587 F.2d 340 (6th Cir. 1978), the court articulated a definition of a variance and a constructive amendment:

> . . . A variance occurs when the proof introduced at trial differs materially from the facts alleged in the indictment. In contrast, an amendment involves a change, whether literal or in effect, in the terms of the indictment. Amendments have been held to be prejudicial *per se* while variances may be subjected to the harmless error rule. *Gaither* v. *United States*, 134 U.S. App. D.C. 154, 413 F.2d 1061 (1969); *United States* v. *DeCavalcante*, 440 F.2d 1264 (3rd Cir. 1971). Variances which create "a substantial likelihood" that a defendant may have been convicted of an offense other than that charged by the grand jury" constitute constructive amendments. Courts apply the prejudicial per se approach to such variances. *United States* v. *Somers*, 496 F.2d 723, 744 (3rd Cir. 1974).

The *Beeler* Court noted that the purpose for the rule prohibiting amendments and constructive amendments included giving notice to the defendant of the charges against him at trial, notice to the trial court so that it may evaluate the sufficiency of any

evidence supporting a conviction, prevention of future prosecutions for the same offense, and "of paramount importance," the "assurance that a group of citizens independent of prosecutors or law enforcement officials have reviewed the allegations and determined that the case is worthy of being presented to a jury for a determination of the defendant's guilt or innocence." *Id* at 342.

In *United States* v. *Cusmano*, 659 F.2d 714 (6th Cir. 1981), the indictment alleged only threats of economic loss. At trial, however, witnesses were permitted to testify regarding physical threats. *Id.* at 715-717. The Court reversed defendant's conviction:

> The events at Cusmano's trial effectively altered the charging terms of the indictment, thus destroying his right to be charged only on the charges set forth in the indictment. . . . We cannot know whether the grand jury would have included in its indictment an allegation of extortion through threats of physical violence. The admission of evidence of such extortion, together with the trial court's instructions indicate that this might have been the basis of Cusmano's conviction. If so, he was convicted on charges the grand jury never made against him. This was fatal error.

Id. at 719.

The Fifth Amendment provides that "no person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury," U.S. Const. Amend. V. A review of the trial record clearly demonstrates that Petitioner was forced to defend himself on two fronts, to wit: against one theory that Petitioner knowingly participated in the filing of insurance claims based upon arsons, as presented through Al Meredith, Sr.'s testimony, and against an uncharged, theory that he participated in the submission of fraudulently inflated insurance claims, as presented through Anita Vianueva Sackett's testimony.

The Sixth Circuit Court of Appeals erred in holding that there had been no constructive amendment or impermissible

variance of the Indictment by the admission of Ms. Sackett's testimony regarding inflated insurance claims on the building portions of the losses. (Opinion, p. 10a).

The appellate court's reliance on *United States* v. *Atisha*, 804 F.2d 920 (6th Cir. 1986), was misplaced. The *Atisha* factual circumstances are materially distinguishable from the instant case. The *Atisha* indictment alleged a conspiracy to hijack trucks filled with goods. It evidenced, as overt acts, the hijacking of one truckload of chickens and one truckload of dry goods. *Id.* at 922. At trial, evidence was admitted that defendant stole a truckload of beef, during the same time period as the alleged conspiracy. The Sixth Circuit held that the introduction of evidence of the theft of the truckload of beef did not constitute a constructive amendment or variance of the indictment, stating that "by admitting evidence of another overt act, the theory of the case was not changed, the defendant was not charged with a different substantive crime, . . ." *Id.* at 927.

In the instant case, the Sixth Circuit focused largely on whether or not the elements of the crime charged were altered in the instant case (Opinion p.10a). It ignored other concerns articulated in *Atisha*, to wit: whether the theory of the case was changed or whether the effect of the introduction of evidence (in this case fraudulently inflated claims) resulted in charging the defendant with a different substantive crime. Both dangers materialized in the instant case. The Prosecution did not introduce evidence of fraudulent, inflated claims to evidence a mere overt act in furtherance of the conspiracy. The Prosecutor maintained that "all of these claims were being inflated." (Tr. 1455-1446). The Prosecutor emphasized Ms. Sackett's testimony that it was standard practice to inflate the insurance claims. He also discussed, at length, figures set forth on certain records showing that the insurance company rarely paid the full amount of the losses claimed. (Tr. 876-838, Ex.27; Tr. 1446-1447). He clearly set forth an alternate theory of the case for consideration by the jury. The evidence in no way related tangentially to some overt act. It was intended by the prosecution to constructively amend the

indictment to charge Petitioner with a separate offense never reviewed by the Grand Jury. The admission of this evidence constituted an impermissible variance.

The Prosecutor advanced the erroneous argument that Ms. Sackett's testimony was properly admitted to show the fraudulent nature of the alleged scheme, as well as how the Defendants were related to, and profited from, it. At no time, however, did the Prosecutor state that this evidence was only being introduced for the limited purpose of demonstrating intent with respect to the offenses charged in the Indictment. It is clear that the government viewed the alleged fraudulent inflation of claims as an alternative theory of criminal liability. Moreover, the government never requested any limiting instruction that the evidence could only be used to show intent or motive, and not as evidence of commission of the offenses charged in the Indictment. A limiting instruction is a necessary prerequisite in this Circuit to the admissibility of evidence of uncharged crimes. *United States* v. *Nemeth*, 430 F.2d 704, 705 (6th Cir. 1970).

The Prosecutor erroneously stated that defense counsel failed to object to Ms. Sackett's testimony. This is simply untrue:

> (Mr. Howard) I am going to object to that question, your Honor. That is really unfairly leading. *First of all, we have gone through, everything we have gone through here, the charge is arson, your Honor. This stuff is not relative.* His suggestion to the witness now by asking a question that assumes the existence of facts not in evidence, namely 'are you aware that contents lists were being inflated.' Your Honor, Counsel knows that is wrong and I would ask the Court to instruct him not to do that in front of this jury again. And, of course, I object.
>
> (The Court) I see nothing improper. Overruled. You may proceed. . . . You made your objection.

The government also contended that Petitioner lost his ability to contest this issue on appeal since defense counsel made no objection to the admission of Damon Adjusting documents

reflecting that the insurance company did not pay the full amounts of claims submitted. (Ex.27, Tr.328). The government failed to recognize, however, that, standing alone, the records were not prejudicial. They became prejudicial only when Anita Sackett testified that the figures contained therein were deliberately inflated in a fraudulent manner. The records alone did not support such an inference. The above stated objection clearly preserves this issue for appellate consideration.

The Prosecutor erroneously argues that charges of fraudulently inflation of claims were already included in the language of the Indictment. The Indictment, however, omitted any mention of fraudulently inflated claims. Alternatively, the government contends that the evidence is admissible under Federal Rule of Evidence 404(b), which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, knowledge, identity, or absence of mistake or accident.

The evidence of fraudulently inflated insurance claims was not admissible under Rule 404(b). Moreover, the trial court not only failed to give any limiting instruction, but never conducted any balancing test under Rule 403 to determine whether such evidence should be excluded if its probative value was substantially outweighed by unfair prejudice, confusion of the issues or the danger of misleading the jury. *United States* v. *Schaffner*, 771 F.2d 149, 153 (6th Cir. 1985); *United States* v. *Ismail*, 756 F.2d 1280, 1286 (6th Cir. 1984). The trial court clearly abused its discretion in admitting such evidence and overruling Petitioner's relevancy objection. *United States* v. *Schaffner*, *supra*, at 154; *United States* v. *King*, 513 F.2d 1001, 1009 (6th Cir. 1975).

The Sixth Circuit erred in never addressing Petitioner's argument that evidence of fraudulent, inflated, claims was inadmissible as evidence of other crimes, wrongs or acts under Federal

Rule of Evidence 404(b). The appellate court never addressed the trial court's failure to conduct a Rule 403 balancing test to determine whether the evidence should have been excluded if its probative value was substantially outweighed by unfair prejudice, confusion or the issues of the danger of misleading the jury.

It is clear that the fraudulent inflated claims evidence was inadmissible under Rules 403 or 404(b). The introduction of such evidence by the government resulted in constructive amendment of the Indictment. It constituted reversible error.

ARGUMENT III

THE SIXTH CIRCUIT ERRED IN HOLDING THAT THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR AND DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT/PETITIONER'S MOTION UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 33 FOR THE REASON THAT THE GUILTY VERDICT RENDERED BY THE JURY WAS MANIFESTLY AGAINST THE GREAT WEIGHT OF THE EVIDENCE.

Petitioner filed a motion for new trial under Fed.R.Crim.P. 33, alleging that the guilty verdict returned by the jury was manifestly against the great weight of the evidence. After a hearing on September 8, 1988, the trial court denied the motion.

While the trial court correctly acknowledged that the "motion goes totally to the credibility of Meredith, Sr.'s testimony. . . ." (Tr. 1707), it concluded, citing *United States* v. *Johnson*, 487 F.2d 1278 (4th Cir. 1978), that court was not empowered to substitute it's judgment for that of the jury in weighing the credibility of Al Meredith, Sr. (Tr. 1708).

The trial court clearly misstated the applicable law regarding its scope of discretion in ruling upon Petitioner's motion. The *Johnson* court did not squarely address the extent of a judge's discretion to evaluate the credibility of a witness on a Rule 33

motion attacking the weight of evidence. In *United States* v. *Arrington*, 757 F.2d 1484 (4th Cir. 1985), the court stated:

> Rule 33 allows a district court to grant a new trial in the interest of justice. When the motion attacks the weight of the evidence, the court's authority is much broader than when it is deciding a motion to acquit on the grounds of insufficient evidence. . . . *Thus, it may evaluate the credibility of the witness. When the evidence weighs so heavily against the verdict that it would be unjust to enter judgment, the court should grant a new trial.* (citations omitted).

Id. at 1485 (emphasis added).

The Sixth Circuit correctly held that the trial court erred in concluding that it had no authority to weigh the credibility of Al Meredith, Sr., pursuant to Petitioner's motion for new trial. It erred in concluding, however, that the trial court correctly denied the motion based upon sufficiency of other evidence (opinion, p 7a).

Apart from the testimony of Al Meredith, Sr., Anita Sackett was the only other witness who gave inculpatory testimony, and then only in relation to uncharged misconduct. As set forth more fully in Argument II, defense counsel objected to the admissibility of this testimony contending that this evidence was irrelevant to the charges set forth in the Indictment. The Sixth Circuit erred in affirming the trial judge's ruling which admitted Ms. Sackett's testimony into evidence. The jury should not have been permitted to consider Ms. Sackett's statements in evaluating whether or not Petitioner knowingly participated in filing insurance claims based upon arson fires. Based upon the remaining evidence at trial, the testimony of Al Meredith, Sr. was not sufficiently credible to support the guilty verdict rendered by the jury. Each and every statement made by Al Meredith, Sr. which tended to inculpate Petitioner was squarely contradicted on all material points by government witnesses, Adar Hassan, Willie Weems, Al Meredith, Jr. and Anita Sackett. There was not a single instance where any of the three arsonists or Anita Sackett corroborated Al Meredith,

Sr.'s testimony that Petitioner provided funds for the purchase of incendiary supplies for the arsons or that Petitioner had any knowledge of the arson character of the fires alleged in the Indictment. (Weems, Tr. 580-592; Hassan, Tr. 692-695; Meredith, Jr., Tr. 392-394; Sackett, Tr. 818-819).

The trial court misinterpreted the verdict as reflecting the jury's ability to decipher the evidence submitted at trial. It based this belief upon the fact that the jury acquitted Petitioner on some of the charges. "I think it is significant that the jury was quite perceptive because it convicted Mr. Migdaleck on some of the counts and it cleared him on the other counts, so it listened very carefully." (Tr. 1708)

It is this very nature of the jury verdict that demonstrates that the jury was confused by the jury instructions and unable to properly evaluate the testimony of Al Meredith, Sr. The "other" testimony from Ms. Sackett, which the jury heard and upon which it based its determination of guilt, was inadmissible and not related to the charges set forth in the Indictment.

For all but one of the eight arson fires, Al Meredith, Sr. gave the exact same testimony (he gave no testimony relative to Petitioner on one fire). He consistently fabricated the same lie, to wit: On seven separate occasions, he obtained money from Petitioner, on behalf of one or more of the three arsonists, so that each would be able to purchase incendiary materials and/or drugs. In each such instance, there were no witnesses present to the exchange to corroborate his testimony.

Even assuming, arguendo, that Al Meredith, Sr.'s testimony were credible, and the jury correctly understood the jury instructions, it should have returned a guilty verdict for all but one of the arson fires. Since Mr. Meredith's testimony was the same for each of the seven fires, it is unreasonable to conclude that the jury would have believed this testimony as to some fires, but disbelieved it as to the others. Al Meredith, Sr. was either credible or he was not. Had the jury truly had the ability to evaluate his credibility, there would not have been a split verdict. It is the

"split nature" of the jury verdict which is troublesome. It conclusively demonstrates that the jury was totally confused and unable to accurately evaluate the inconsistencies fundamentally apparent in Al Meredith, Sr.'s testimony.

The evidence at trial, apart from the testimony of Al Meredith, Sr., was insufficient to establish that Petitioner had knowledge of the arson character of the fires which provided the basis for the insurance claims and mailings relative thereto. The case at bar is truly exceptional. The verdict was manifestly against the great weight of the evidence.

The sworn testimony of Al Meredith, Sr. in the Recorder's Court trial, coupled with consideration of his reputation for truth in the community, persuasively demonstrates that he is a flagrant perjurer entitled to no credibility in weighing the evidence. The Sixth Circuit clearly erred in concluding that the trial court did not commit reversible error by holding that the verdict was not against the great weight of the evidence. The verdict was truly a miscarriage of justice.

ARGUMENT IV

THE SIXTH CIRCUIT ERRED IN HOLDING THAT THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY VOUCHING FOR THE CREDIBILITY OF THE PROSECUTION IN THE JURY'S PRESENCE, THEREBY DEPRIVING DEFENDANT/PETITIONER OF A FAIR AND IMPARTIAL TRIAL.

The trial judge, in the presence of the jury, stated: "I am going to rely on the United States Attorney to be honest. He always has been. He always will be." (Tr. 29).

Counsel for Defendant Ware, after conferring with all counsel, moved for a mistrial on the basis that the trial court had vouched for the credibility of the prosecution in the presence of the jury. The trial court denied the motion, stating "I have dealt

with Mr. Soisson for the last eight years and he has been a reputable United States Attorney, and I certainly can tell the jury that, and that certainly is not a basis for a mistrial." (Tr. 1346).

A trial judge "must not give an impression of partisanship on either side." *United States v. Scales*, 594 F.2d 558 (6th Cir), *cert. denied*, 441 U.S. 946, 60 L.Ed.2d 1049, 441 U.S. 946 (1979). The Sixth Circuit has emphasized the importance of a trial judge conducting himself in an appropriate manner and with an objective demeanor. *United States v. Slone*, 833 F.2d 595 (6th Cir. 1987). In *United States v. Hickman*, 592 F.2d 931 (6th Cir. 1979), the court stated that a trial judge must take great care to "always be calmly judicial, dispassionate and impartial. He should sedulously avoid all appearances of advocacy as to those questions which are ultimately to be submitted to the jury." *Id.* at 933. The court in *United States v. Assi*, 748 F.2d 62 (1948), provided a frame of reference for assessing improper judicial remarks:

> The basic errors in the charge were aggravated by other conduct of the district judge. At one point in the trial, he vouched for the credibility of the prosecutor by referring the jury to "the words of the distinguished Assistant United States Attorney who's been handling this case before us." It is not proper for a court to refer to the high character of counsel, especially of only one side (citations omitted).

Id. at 68.

The remarks made by the trial court in the instant case were far more prejudicial than those examined in *Assi*. Measured by the standards articulated by the Sixth Circuit in the cases cited above, Petitioner was clearly denied a fair and impartial trial as a result of the trial court's remarks vouching for the Prosecutor's credibility. By endowing the Prosecutor with a presumption of honesty, the trial court placed the full weight of its position and authority behind the Prosecutor's case. It impermissibly shifted the burden of proof to Petitioner. The Sixth Circuit erred in affirming the denial of the motion for mistrial.

CONCLUSION

For reasons stated above, Petitioner respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari, or in the alternative, enter an order summarily reversing the Opinion and Order of the Sixth Circuit Court of Appeals.

Respectfully Submitted,

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APPENDICES

Appendix A

Nos. 88-1953;1954;1955;1956; 88-2031; 88-2110

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

OCELIA M. PERKINS;
DONALD J. MCQUEEN;
JOYCE SCOTT;
PAMELA H. WILLIAMS;
ANDERS MIGDALECK; and
STELLA H. WARE,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED: MARCH 7, 1990

BEFORE: NELSON and RYAN, Circuit Judges; and MEREDITH, District Judge.*

RYAN, J., Circuit Judge. Defendants Anders Migdaleck, Donald J. McQueen and Pamela H. Williams appeal their convictions for mail fraud, 18 U.S.C. § 1341, and interstate transportation of securities taken by fraud, 18 U.S.C. § 2314. Defendants Ocelia M. Perkins, Stella H. Ware and Joyce Scott appeal their convictions for mail fraud, 18 U.S.C. § 1341. All convictions arose from a scheme to defraud insurance companies by intentionally setting fires to residential homes located in the Detroit area in order to collect insurance proceeds. Several issues are raised on appeal but none require reversal. Accordingly, we affirm.

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* The Honorable Ronald E. Meredith, United States District Judge for the Western District of Kentucky, sitting by designation.

Appendix A

(Nos. 88-1953-56;2031;2110)

I.

Defendant Migdaleck, a licensed contractor and owner of Town and Country Builders and Anders Construction Company purportedly organized the arson scheme and paid the participants from the insurance proceeds. Defendants McQueen, Williams and Perkins were homeowners who arranged to have fires set at their respective homes. Defendant Ware helped arrange the fire at defendant Perkins' home. In each case, claims were made with the homeowners' insurance carriers through use of mails.

On January 6, 1988, all the defendants and others were charged with mail fraud, 18 U.S.C. § 1341, and interstate transportation of securities taken by fraud, 18 U.S.C. § 2314, in a twenty-three count indictment. Defendant Midgaleck was indicted on all twenty-three counts as was Anita Vianveva Sackett, a licensed public adjuster, who worked for defendant Migdaleck. Sackett entered into a plea agreement and testified at trial in exchange for leniency. The arsonists who set the fires also testified.

The first two counts involved the January 18, 1983 arson fire at defendant McQueens' residence. Migdaleck and McQueen were charged with mail fraud and interstate transportation of securities taken by fraud. Migdaleck was acquitted and McQueen was convicted.

Counts three and four involved the February 25, 1983 arson fire at the residence of Ronald Pitts. Pitts, Migdaleck and McQueen were charged with two counts of mail fraud. Pitts pled guilty prior to trial and testified in exchange for leniency. Both Migdaleck and McQueen were convicted.

Counts five through nine involved the July 27, 1984 arson fire at White's residence. Migdaleck and White were charged with five counts of mail fraud. Both were convicted.

Counts ten through twelve involved the October 20, 1983 arson fire at defendant Williams' residence. Migdaleck, White and Williams were charged with mail fraud and two counts of interstate transportation of securities taken by fraud. Migdaleck was acquitted and White and Williams were convicted.

Counts thirteen and fourteen involved the May 11, 1983 arson fire at Perkins' home. Migdaleck, Perkins and Ware were charged with two counts of mail fraud. All were convicted.

Counts fifteen through twenty involved the January 15, 1983 arson fire at the home of Doris Lauderdale. Lauderdale and Migdaleck were charged with interstate transportation of securities taken by fraud and five counts of mail fraud. Both were acquitted.

Counts twenty-one and twenty-two involved the March 15, 1983 arson fire at the home of Joyce Manns. Migdaleck and Scott were charged with two counts of mail fraud. Migdaleck was acquitted and Scott was convicted.

Count twenty-three involved the January 18, 1984 arson fire at a residence owned by Willie Dash. Migdaleck and White were charged with mail fraud. Both were convicted.

Following the imposition of sentences, defendants appealed. Michael White's appeal was dismissed as untimely.

II. Defendant Migdaleck

A. Failure to Instruct Jury on Exculpatory Testimony.

Defendant Migdaleck contends the trial court erred in failing to properly instruct the jury, pursuant to *Cool v. United States*, 409 U.S. 100 (1972), and *United States v. Stulga*, 531 F.2d 1377 (6th Cir. 1976), *appeal after remand*, 584 F.2d 142 (6th Cir. 1978), concerning evaluation of the exculpatory testimony offered by the three arsonists.

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The testimony of arsonists Al Meridith, Jr., Willie Weems and Adar Hassan was essentially favorable to defendant Migdaleck. The three testified that the arson fires were represented to Migdaleck as legitimate losses and all three witnesses inferred that Al Meredith, Sr. operated the scheme. However, Al Meredith, Sr. testified that Migdaleck knew about the scheme, had made Sackett a public adjustor to further the scheme, paid commissions to the arsonists, and provided the funds used to purchase the materials used to start the fires.

On appeal, the defendant Migdaleck asserts the trial court erred in failing to give an instruction which would enhance the effect of the exculpatory testimony of the three arsonists.

The court instructed the jury:

> The testimony of one who asserts by his testimony that he is an accomplice may be received in evidence and considered by the jury even though not corroborated by other evidence and given such weight as the jury feels it should have. You should always keep in mind, however, that such testimony is always to be viewed with caution and considered with great care. *You should never convict a Defendant upon the unsupported testimony of an alleged accomplice unless you believe that unsupported testimony beyond a reasonable doubt.*

(Emphasis added.) This instruction was requested by defendant McQueen and is based on Devitt and Blackmar, *Federal Jury Practice and Instructions*, 3d ed, § 17.06 (1977).

At trial, after the court finished instructing the jury, counsel for defendant Migdaleck objected to the foregoing instruction, stating that the instruction that should have been given is:

> [I]f you believe the evidence of the accomplice, and you feel that that in and of itself is sufficient to satisfy you that it is proof of guilt beyond a reasonable doubt, then you may accept it.

On appeal, defendant contends that, based on his objection and requested single-sentence instruction, the trial court should have been alerted to its duty to instruct the jury on the standard for evaluating accomplice testimony pursuant to *Cool v. United States*, 409 U.S. 100 (1972), and *United States v. Stulga*, 531 F.2d 1377 (6th Cir. 1976), *appeal after remand*, 584 F.2d 142 (6th Cir. 1978). We disagree.

In *Cool*, the accomplice testified for the defense and his testimony was completely exculpatory. Over defense counsel's objection, the district court instructed the jury to consider the accomplice testimony *if* it found it true beyond a reasonable doubt. 409 U.S. at 102. The Supreme Court reversed, finding the instruction placed an improper burden on the defense, obstructed the defendant's sixth amendment right to present exculpatory accomplice testimony to the jury, and, in effect, reduced the government's burden of proof. 409 U.S. at 103, 104. In a footnote, the Court also found it confusing and unfair to instruct the jurors that they could convict on the basis of accomplice testimony without telling them they could also acquit on this basis. 409 U.S. at 103, n.4.

In *Stulga*, several accomplices testified for the government. Two of them partially exculpated defendant. The defense counsel objected to the court's instruction on accomplice testimony and specifically requested that the jury be instructed that exculpatory testimony of an accomplice did not have to be believed beyond a reasonable doubt or by a preponderance. *Id.* at 1380. The court declined to do so. On appeal, this court held the trial court committed reversible error in failing to instruct the jury on the manner in which to evaluate an accomplice's exculpatory testimony in light of the "virtual dirth of inculpatory testimony" and the "wealth of exculpatory testimony." *Id.* at 1380. This court concluded that the lack of precision in the charge could have confused the jury and led it to conclude that in order to consider

the accomplice's exculpatory testimony at all, it had to believe the testimony beyond a reasonable doubt. *Id.*[1]

Here, unlike the situation in *Stulga* or *Cool*, defense counsel's requested instruction was not a request that the jury be advised on how to evaluate exculpatory accomplice testimony (*Stulga*), or a request to instruct the jury that accomplice testimony can provide the basis of acquittal (*Cool*). Rather, defense counsel's objection and proposed instruction, in effect, asked the court to instruct the jury that it could accept inculpatory accomplice testimony if it believed the testimony beyond a reasonable doubt. It was essentially the same instruction as was given by the court, although the court's instruction stated the matter more understandably and more accurately.

We are presented then with a situation in which the defendant assigns error to the trial court's failure to instruct the jury as to the proper manner in which to evaluate exculpatory accomplice testimony, although no timely and understandable request for such an instruction was made at trial and no objection registered to its omission. Consequently, we review this assignment of error under the plain error rule. Fed. R. Crim. P. 52(b). Where, as here, no specific objection was registered at trial, reversal is required only where a miscarriage of justice would result. *United States* v. *Hook*, 781 F.2d 1166, 1172 (6th Cir.), *cert. denied*, 479 U.S. 882 (1986). We think it is manifest that no miscarriage of justice resulted from the court's failure to instruct, sua sponte, on the manner in which the jury might have evaluated the exculpatory accomplice testimony, and defendants cite no authority to

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[1] On appeal, following the conviction on remand, the defendant in *Stulga* again contested the court's instruction on accomplice testimony. The trial court left unchanged that portion of the instruction objected to here; instead, the court merely added that exculpatory accomplice testimony should be considered and weighed along with all other evidence and could be the bases of a not guilty verdict. In *United States* v. *Stulga*, 584 F.2d 142, 144-145 (6th Cir. 1978), this court held the instruction given by the trial court was sufficient.

the contrary. *See United States* v. *Vigi*, 515 F.2d 290 (6th Cir.), *cert. denied*, 423 U.S. 912 (1975).

B. Denial of New Trial.

Defendant Migdaleck also contends the trial court erred in failing to recognize that it could weigh the credibility of witnesses when reviewing a new trial motion on the ground that the verdict was against the great weight of the evidence. Fed. R. Crim. P. 33.

The trial court's authority in deciding a motion for a new trial on the ground that the verdict is against the great weight of the evidence, Fed. R. Crim. P. 33, is much broader than its authority on a motion for acquittal based on the sufficiency of the evidence, Fed. R. Crim. P. 29. *United States* v. *Turner*, 490 F. Supp. 583, 593 (E.D. Mich. 1979), *aff'd* (without opinion), 633 F.2d 219 (6th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *United States* v. *Arrington*, 757 F.2d 1484, 1485 (4th Cir. 1985). In the former, the court may weigh the evidence and consider the credibility of the witnesses. *Turner*, 490 F. Supp. at 593; *Arrington*, 757 F.2d at 1485.

Motions for new trial are disfavored and they are granted only with great caution. *Turner*, 490 F. Supp. at 593. Ordinarily, a new trial should be granted only where the evidence weighs so heavily against the verdict that a miscarriage of justice would result if the verdict were allowed to stand. *Turner*, at 593; *Arrington*, at 1485. A decision on a motion for new trial will not be upset on appeal absent an abuse of discretion. *Arrington*, 757 F.2d at 1486.

The theory of defendant Migdaleck's motion is that the principal witness against him, Al Meredith, Sr., was completely unworthy of belief. At the hearing on the motion, defendant contended that without Meredith Sr.'s testimony, there was no proof defendant participated in the arsons, and the arsons were the whole crux of the case. The government contended that it had shown by circumstantial and direct evidence that defendant

Midgaleck controlled the operation in that he paid all the participants and controlled the disbursement of insurance proceeds.

The trial court denied the new trial motion for two reasons: first, the court did not believe credibility questions could be raised by a new trial motion pursuant to *United States* v. *Johnson*,[2] 487 F.2d 1278, 1280 (4th Cir. 1973), and there was no basis to substitute the court's judgment for the jury in weighing the credibility of Al Meredith, Sr.; second, the court found the other evidence of Midgaleck's guilt was sufficient to support the verdict. The court noted that the jury was quite perceptive and found defendant failed to present anything to establish that the evidence preponderated heavily against the verdict.

Defendant is correct that the trial court failed to recognize that, on a motion for new trial on the ground that the verdict is against the great weight of the evidence, the court was indeed entitled to consider the credibility of the witnesses. If the sole basis for the district court's denial of the new trial motion was that credibility was not a proper subject for the court to examine, we would be inclined to remand this case to the district court to consider the credibility question. However, the court also found that the other evidence inculpating Migdaleck was sufficient to support the verdict, a conclusion well-supported in the record. Moreover, the district court commented favorably on the jury's ability to evaluate the evidence since it acquitted defendant Migdaleck on some of the charges.

Given the record supported alternative basis for the trial court's denial of the new trial motion, and the rule that a new trial should be granted on the ground here asserted only when the evidence preponderates heavily against the verdict, we cannot say the trial court abused its discretion in denying defendant's motion.

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[2] *Johnson* involves a new trial motion based on newly discovered evidence, not based on a verdict that is against the great weight of the evidence.

C. Constructive Amendment of Indictment.

Defendants Migdaleck and Williams contend that the trial court constructively amended the indictment when it allowed Anita Sackett to testify that Migdaleck inflated the building loss portion of insurance claims by directing the adjustor to "go heavy" on the losses and testify that the claim for the fire at White's residence was indeed inflated.

At trial, counsel for defendant Migdaleck objected to Sackett's testimony on the inflation of the building loss portion of insurance claims on relevancy grounds. The objection was overruled.

The indictment against defendants Migdaleck and White was based on the premise that defendants were involved in a scheme to defraud insurance companies by intentionally setting fires to residential homes and using the mails to collect the insurance proceeds. The indictment did not allege that defendants inflated the building portion of the insurance claims.

A court may not require a defendant to be tried on charges that are not included in the indictment. *Stirone* v. *United States*, 361 U.S. 212 (1960). A constructive amendment occurs when the charging terms of the indictment are, in effect, altered by the prosecutor or the court. *United States* v. *Atisha*, 804 F.2d 920, 927 (6th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987) (quoting *United States* v. *Jones*, 647 F.2d 696, 700 (6th Cir.), *cert. denied*, 454 U.S. 898 (1981)). A variance occurs when the charging terms of the indictment are left unaltered but the evidence offered at trial proves materially different from those alleged in the indictment. *Id.*

A constructive amendment is per se prejudicial but a variance is not grounds for reversal unless the defendant's substantial rights are affected. *United States* v. *Goldfarb*, 643 F.2d 422, 433 (6th Cir.), *cert. denied*, 454 U.S. 860 (1981).

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To determine whether a constructive amendment occurred, the court must decide whether *the elements of the crime charged* were altered. *Atisha*, 804 F.2d at 927 (citation omitted). (Emphasis added.)

The elements the government is required to prove for mail fraud are a scheme to defraud and use of the mails to execute or further the scheme. *United States* v. *Schilling*, 561 F.2d 659, 661 (6th Cir. 1977).

Defendants contend the introduction of evidence that the building loss portion of the claims were inflated, in effect, created an alternate theory for the jury to find defendants had entered into a scheme to defraud and, thus, constituted a constructive amendment of the indictment. The prosecution contends the trial court did not err in admitting the evidence to show the fraudulent nature of the scheme. The government contends the evidence did not change the fact that the scheme to defraud was based on arson but, instead, showed defendants' relationship to the scheme and how they profited by it.

We find that the mail fraud charge in the indictment was the same charge described to the jury and conclude that the introduction of the testimony on claim inflation did not change the basic theory of the fraudulent scheme so as to constitute a constructive amendment of the indictment. *Atisha*, 804 F.2d at 927. Moreover, we hold that had the introduction of the evidence constituted an impermissible variance, any error in admitting the evidence was harmless, *United States* v. *Mahar*, 801 F.2d 1477, 1503 (6th Cir. 1986), since the testimony at trial centered on the scheme to commit arson, the underlying basis for the mail fraud charge set forth in the indictment.

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III. Defendant Williams' Denial of Effective Assistance of Counsel.

Defendant Williams also contends that she was denied effective assistance of counsel because her attorney also represented defendant White. Specifically, she contends an actual conflict of interest existed because her counsel failed to cross-examine Meredith, Sr. and arsonist Willie Weems, although their testimony made the defense of shifting the blame to White a viable option. Defendant claims the trial court failed to inquire about the joint representation and failed to advise defendant about the right to separate representation as required by Fed. R. of Crim. P. 44(c). Williams made no objection below to the joint representation.

Multiple representation is not a per se violation of the sixth amendment right to effective assistance of counsel. *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978). To establish a sixth amendment violation, a defendant who raises no objection below must show that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980).

At oral argument, defendant conceded that the trial court's failure to conduct a Fed. R. Crim. P. 44(c) inquiry did not automatically require reversal. This is in accord with the position of those circuits which have addressed the issue. *See United States v. Crespo de Llano*, 830 F.2d 1532, 1539 (9th Cir.), *reh. den.*, 838 F.2d 1006 (9th Cir. 1987) (citations omitted). It is also in accord with the advisory committee notes to Rule 44(c) which state:

> The failure in a particular case to conduct a rule 44(c) inquiry, would not, standing alone, necessitate the reversal of a conviction of a jointly represented defendant.

Williams argues that counsel's failure to cross-examine Meredith, Sr. and Weems demonstrated an actual conflict of interest

because their testimony revealed that White was more culpable then Williams thus enhancing the liklihood of success of the shifting blame defense.

A conflict of interest must be actual, not hypothetical or merely possible. *Cuyler*, 446 at 350; *United States* v. *Carter*, 721 F.2d 1514, 1537 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984). The defendant must demonstrate that the interests of the jointly represented defendants were so inconsistent that the pursuit of a plausible argument in favor of one would damage the defense of the other. *Carter* at 1536; *United States* v. *Romero*, 780 F.2d 981, 986 (11th Cir. 1986). In order for a shifting blame defense to give rise to an actual conflict of interest, the defense must be realistically available to defense counsel. *United States* v. *Carter*, 721 F.2d at 1537; *Romero*, at 986.

Defendant Williams relies heavily on the failure of her trial counsel to cross-examine Meredith, Sr. and Weems on the roles Williams and White played in connection with the fire at the residence owned by Williams. At trial, Meredith, Sr. testified that Williams wanted no part in the fire at first, but stood in line with the rest of the perpetrators to collect her share of the commission after the fire occurred. Weems, the arsonist, testified that prior to the fire, Williams had him review the insurance policy to make sure the property was adequately insured; Williams agreed to the fire and paid Weems a deposit, a sum Weems required to insure Williams was definite about the plan. Williams testified and denied ever speaking with Meredith, Sr. or Weems prior to the fire, and denied she was involved in any fraudulent scheme to set her home on fire.

We agree that the evidence of defendant White's participation in the overall scheme, and in particular his involvement in the Williams' fire, was stronger than the evidence the government had against Williams. However, that does not diminish the force of

the evidence that Williams was identified as a participant in the scheme to set the home she owned on fire.

We think defendant Williams has failed to show that she stood to gain significantly by abandoning the defense pursued by her trial counsel. She does not contend that her co-defendant would have exculpated her. Her only allegation of actual conflict relates to her contention that White is more blameworthy than she is. She does not contend the evidence against her was insufficient to convict. We conclude defendant Williams failed to demonstrate an actual conflict of interest. *See Carter*, 721 F.2d at 1537, *United States* v. *Benavidez*, 664 F.2d 1255, 1260-61 (5th Cir.), *reh. denied*, 671 F.2d 1380 (5th Cir.), *cert. denied*, 457 U.S. 1121 and 457 U.S. 1135 (1982).

IV. Defendant Scott

A. Admission of the Check Evidence.

Defendant Scott contends the admission into evidence of two checks written by Anders Construction Company to Scott and a 1983 check registry from Anders Construction Company was improper because the evidence was irrelevant, prejudicial, and constituted inadmissible evidence of other crimes and bad acts. Fed. R. Evid. 404(b). At trial, defendant contended the check evidence was inadmissible because the checks were not issued within the time period charged in the indictment and because the checks and the check registry suggested the inference that she was involved in other arson fires for which she was not charged Defense counsel also contended that the evidence was used to suggest guilt by association.

The government contends that the relevance of the two checks was to show that defendant Scott was not just Migdaleck's secretary, as was claimed, but was paid commissions for bringing business to Anders Construction Company, as were other "pro-

grammers," and the check registry was introduced to show the relationship between the various parties to the fraudulent scheme.

The trial court held the checks were relevant and their probative value was not outweighed by their prejudicial effect.

A trial court does not err in admitting evidence that has a tendency to make more or less probable a material proposition for which it is offered, unless it is shown that the probative value of the evidence is substantially outweighed by its prejudicial effect. Fed. R. Evid. 401, 403.

We conclude this evidence was relevant and its probative value was not substantially outweighed by its prejudicial effect. There was strong circumstantial evidence, specifically the testimony of Meredith, Sr. and Hassan, that Scott was a principal in the scheme to burn down the premises on Lauder Avenue on March 15, 1983. The essence of Scott's defense was that she was merely a secretary at Anders Construction and was not involved in the arson for profit scheme. The court admitted the challenged checks upon the government's argument that the checks were admissible as proof that Scott was more than just a secretary, but was a "programmer" being paid commission for bringing arson repair business to Migdaleck, just as other "programmers" were. The check register for 1983 was admitted in order to show that commission checks were written to Meredith, Sr., and Jr., Weems, Hassan, Scott, and other defendants in the case at or near the time of the fire to which each was connected in the testimony, and to show the relationship between the various defendants during 1983. An additional reason the check register was offered and admitted is that the government had possession of some, but not all, of the checks relevant to the arson schemes, and wished to prove, by introduction of the check register, the pattern of issuance of checks related to arson schemes.

We think both the two checks and the 1983 check register were shown to be relevant and were therefore admissible. More-

over, the defendant Scott has failed to demonstrate that the relevance of the three exhibits was substantially outweighed by the possible prejudicial effect of suggesting Scott's involvement in a still wider scheme of arson for profit than the March 15, 1983 Lauder Avenue fire, a point never argued by the government. We conclude the trial court did not err in admitting the challenged exhibits.

B. Sufficiency of the Evidence.

Defendant Scott's second issue on appeal is tied to her first. She contends there was insufficient evidence to convict her of mail fraud because the government failed to prove she entered into a scheme with Migdaleck to defraud on the dates charged in the indictment. Scott contends the government's case rested on the two challenged checks and the testimony of immunized convicted arsonists, whose credibility was highly questioned. She notes that defendant Migdaleck was acquitted of the charges on which she was convicted.

In order to convict a defendant of mail fraud, the prosecution must prove a scheme to defraud and use of the mails to execute or further the scheme. *United States* v. *Schilling*, 561 F.2d 659, 661 (6th Cir. 1977). Defendant Scott does not contest the sufficiency of the evidence on the use of the mails element of the mail fraud charge.

This court reviews a sufficiency of the evidence claim by determining whether, in viewing the evidence in a light most favorable to the prosecution, a rationale trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979), *reh. denied*, 444 U.S. 890 (1979).

Al Meredith, Sr. testified that he spoke with defendant Scott about the March 15, 1983 fire at Joyce Manns' house before it occurred. Scott introduced Manns as a "customer." During the conversation between Meredith, Sr., Manns and Scott, Meredith,

Sr. checked Manns' insurance policy and discussed Manns' potential recovery from the fire and where Manns would stay while repairs were being made.

Adar Hassan testified that Meredith, Sr. asked him to meet Scott at Manns' home and set the fire. Hassan met Scott at Manns' home on the day of the fire, went in and, while Scott and the occupants remained downstairs, went upstairs and set the fire.

The two checks were admitted to show defendant Scott was paid commissions by defendant Migdaleck.

The evidence, taken in a light most favorable to the prosecution, establishes defendant Scott was a participant in the scheme to defraud the insurance company and is sufficient to convict her of two counts of mail fraud, 18 U.S.C. § 1341.

V. Defendant McQueen's objection to the Jury Instruction.

Defendant McQueen contends the trial court failed to instruct the jury that the interstate movement of the securities must have been reasonably foreseeable by defendant in order to convict him of interstate transportation of securities taken by fraud, 18 U.S.C. § 2314. The court instructed the jury:

> If the evidence establishes to your satisfaction beyond a reasonable doubt that a Defendant knowingly caused the securities . . . to be transported from one state to another, then the Defendant caused the securities to be transported in interstate commerce within the meaning of the statute . . . .
>
> *[I]t is not necessary that the Defendant knew the security would be transported in interstate commerce.*
>
> Of course, it is common knowledge that checks or drafts drawn on an out-of-state bank will be sent to that bank for collection. If . . . a Defendant knowingly caused the checks . . . to be put in interstate commerce, then . . . he has

> caused it to be transported in interstate commerce within the meaning of the law.

(Emphasis added.) Defendant objected to the instruction, stating that the instruction should have included language that the interstate transportation of the documents must have been reasonably foreseeable to defendant.

The majority of courts addressing the matter have held that the interstate transportation requirement of § 2314 is merely to insure federal jurisdiction and does not impose a requirement that the government prove that the interstate transportation was in any way reasonably foreseeable. *United States* v. *White*, 451 F.2d 559, 560 (6th Cir. 1971), *cert. denied*, 405 U.S. 1071 (1972); *United States* v. *Kibby*, 848 F.2d 920, 923 (8th Cir. 1988); *United States* v. *Squires*, 581 F.2d 408, 409-10 (4th Cir. 1978).

Therefore, we conclude the trial court did not err in failing to instruct the jury that the foreseeability of the interstate transportation of the securities is required to convict defendant of interstate transportation of securities taken by fraud, 18 U.S.C. § 2314.

VI. Defendants Perkins and Ware Denial of Severance Motion.

Defendants Perkins and Ware argue that joinder was improper under Fed. R. Crim. P. 8(b) since they did not participate in the "same series of acts or transactions" as the other defendants. Alternatively, defendants argues that even if joinder was proper under Rule 8(b), severance should have been granted under Fed. R. Crim. P. 14 because of the substantial prejudice to defendants resulting from the jury considering the evidence against other persons in order to convict the defendants.

At trial, all defendants joined in the motion asserting improper joinder, Rule 8(b), and requesting severance due to prejudice, Rule 14; however, only Perkins and Ware address this

issue on appeal. The district court held that there was a factual similarity in the counts; the proofs overlapped; the participants had the same objective, to burn homes and collect the insurance; and judicial economy would best be served by joinder. The court further held that the defendants failed to make a strong showing of substantial prejudice and declined to sever the trial under Rule 14.

Joinder of multiple defendants under Rule 8(b) is proper if each count in the indictment arises out of the same series of acts or transactions. *United States* v. *Hatcher*, 680 F.2d 438, 441 (6th Cir. 1982). A group of acts or transactions constitutes a series if they are logically related and involve overlapping proofs. *United States* v. *Swift*, 809 F.2d 320, 322 (6th Cir. 1987) (citing *United States* v. *Johnson*, 763 F.2d 773, 776 (6th Cir.), *cert. denied*, 474 U.S. 862 (1985)). Rule 8(b) is broadly construed in favor of joinder because Rule 14 provides protection against prejudicial joinder. *Swift*, at 322. A significant consideration is whether joinder would promote judicial economy. *Id.* Review of a district court's refusal to sever pursuant to Rule 8 is reviewed for an error of law but is subject to the harmless error standard. *Hatcher*, 680 F.2d at 442.

We conclude joinder was proper. All twenty-three counts of the indictment involved a series of schemes to defraud insurance companies by intentionally setting fire to residential dwellings in order to collect insurance proceeds. The record reveals that defendants Perkins and Ware, as well as the other defendants, were connected to the kingpin of the entire scheme to defraud, defendant Migdaleck, and the mail fraud counts against Perkins and Ware were logically interrelated with the other acts charged in the indictment. *See Johnson*, 763 F.2d at 776. Moreover, joinder served the interest of judicial economy. *See*, *Swift*, 809 F.2d at 322. We conclude, therefore, that joinder was proper under Rule 8(b).

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Under Fed. R. Crim. P. 14, the trial court may order severance if a defendant is prejudiced by joinder of defendants or claims. *Swift*, 809 F.2d at 322. This court reviews the district court's denial of a severance motion under Rule 14 for an abuse of discretion, and to establish an abuse of discretion the defendant must make a strong showing of prejudice. *Id.* The defendant must show the jury was not able to separate and treat distinctively evidence relevant to each defendant and even if some potential jury confusion is established, this must be balanced against society's need for speedy and efficient trials. *Id.* (quoting *United States v. Gallo*, 763 F.2d 1504, 1525 (6th Cir. 1985), *cert. denied*, 474 U.S. 1068, and 474 U.S. 1069, and 475 U.S. 1017 (1986)).

Defendants' basic contention on appeal is that they were prejudiced by the spillover of evidence relating to the other arson fires because the evidence against them was not overwhelming.

Albert Meredith, Jr. testified that defendant Ware contacted him and told him that defendant Perkins wished to speak to him about burning a dwelling. Meredith, Jr. spoke to Perkins in Ware's presence and discussed the arson, the fire repairs, and the monetary advancement. They proceeded to Perkins' home where Meredith, Jr. examined Perkins' insurance policy and determined where the fire should be set. Thereafter, the fire was set by Adar Hassan. Perkins admitted Meredith, Jr., Hassan and Ware into her home and then Perkins and Ware left. Hassan set the fire.

Adar Hassan testified that he, Meredith, Jr. and Ware drove to Perkins home on the day of the fire. They discussed what type of fire was required. At Perkins' home, Hassan discussed the location of the fire with defendant Perkins and then asked everyone to leave while he prepared the fire.

"Absent a showing of substantial prejudice, spillover of evidence from one case to another does not require severance." *Johnson*, 763 F.2d at 777 (quoting *Gallo*, 763 F.2d at 1526).

In view of the foregoing evidence, any spillover evidence of other schemes to intentionally set fire to residential dwellings cannot establish substantial prejudice. Moreover, the district court gave the jury cautionary instructions regarding the separate consideration to be given to each defendant. A jury is presumed capable of sorting out evidence and considering each count and each defendant separately. *Swift*, 809 F.2d at 323. That the jury did so in the instant case is evidenced by the fact that one homeowner was acquitted and defendant Migdaleck was acquitted in part.

As this court said in *Swift*, "even if there is some potential for jury confusion, it is small and does not outweigh 'society's need for speedy and efficient trials.' " *Id.* (quoting *Gallo*, 763 F.2d at 1525). The trial court did not abuse its discretion in denying defendants' severance motion under Rule 14.

VII. Defendant Perkins' Co-conspirator Hearsay Objection.

Defendant Perkins contends that the trial court erred in admitting the hearsay testimony of Adar Hassan and Albert Meredith, Jr.

Defendant did not object to the testimony by Hassan that he spoke to Perkins at her home on the day of the fire and Perkins had told him she wanted the fire set in the kitchen. Thus, we are not obligated to address this issue. In all events, the testimony appears admissible as an admission under Fed R. Evid. 801(d)(2)(A).

Defendant did object to the testimony of Albert Meredith, Jr. regarding Perkins' agreement to proceed with plans to set a fire at her home.

Meredith, Jr. testified that he had spoken with defendant Perkins and defendant Ware about the possibility of setting a fire at Perkins' residence. He reviewed Perkins' insurance policy and

inspected her home to select a location for the fire. He testified that Perkins took some time to think about it but eventually he heard from defendant Ware that Perkins was ready to have a fire.

Defendant objected to Meredith, Jr. testifying as to what defendant Ware told him Perkins said as the testimony was hearsay. The court stated the testimony was admissible under Fed. R. Evid. 801(d)(2)(E) as a statement of a co-conspirator.

On appeal, defendant Perkins contends the trial court failed to make the preliminary determination required for the admission of a co-conspirator's statement; namely, that a conspiracy existed, and that the statement was made during the course of and in furtherance of the conspiracy.

Fed. R. of Evid. 801(d)(2)(E) provides:

> (d) A statement is not hearsay if —
>
> . . . .
>
> (2) The statement is offered against a party and is
>
> . . . .
>
> (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

In *United States v. Enright*, 579 F.2d 980 (6th Cir. 1978), this court held that the admissibility of a co-conspirator's statement under Rule 801(d)(2)(E) is for the court to decide under Fed. R. Evid. 104(a) and the preliminary question to be answered is whether the co-conspirator's statement falls within the Rule, that is, whether a conspiracy existed and whether the statement was made in the furtherance of the conspiracy. *Id.* at 984, 985.

The United States Supreme Court in *Bourjaily v. United States*, 483 U.S. 171 (1987), agreed that Rule 104(a) governs the admissibility of a co-conspirator's statement and a preponderance

of the evidence standard applies. *Id.* at 175. The Court also held that the trial court may consider the out-of-court statement of the alleged co-conspirator sought to be admitted when making its preliminary determination on whether the co-conspirator statement is admissible under 801(d)(2)(E). *Id.* at 180. However, the court declined to decide whether the lower court could rely solely upon the co-conspirator's hearsay statement to establish that a conspiracy existed by a preponderance of the evidence under Rule 104(a). *Id.*

In this case, defendant Perkins contends that Meredith, Jr.'s hearsay testimony that Ware told him that Perkins said she was ready to have the fire was the only testimony linking Perkins to the conspiracy. That is not the case. Meredith, Jr. testified that he spoke with Perkins about a plan to set fire to her home prior to the time the alleged statement by Ware was made, and Hassan testified that he discussed the location of the fire with Perkins the day the fire was set.

In light of the above testimony, the hearsay statement of Meredith, Jr., that Ware said that Perkins said she was ready to have the fire, is a statement in furtherance of the conspiracy, made by a co-conspirator during the course of the conspiracy. Nor is the Meredith, Jr. testimony challengeable as double hearsay, since the Perkins statement to Ware is "not hearsay" under Fed. R. Evid. 801(d)(2)(A), since it is a statement of admission. Therefore, the trial court did not abuse its discretion in admitting the co-conspirator statements as evidence. *See United States* v. *Rios*, 842 F.2d 868, 874 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 840 (1989).

Defendant Perkins also contends that the trial court failed to make a determination on the record that sufficient testimony existed to connect Perkins with the conspiracy charge, when the court held that Meredith, Jr. could testify as to what Ware told him Perkins said under the co-conspirator exception to the

hearsay rule, 801(d)(2)(E). The short answer to Perkins' contention is that the court, in passing upon the challenge to the Meredith, Jr. testimony, was not obligated to announce on the record the preliminary finding of fact which conditioned the admissibility of the testimony under Fed. R. Evid. 801(d)(2)(F). *See United States* v. *Curro*, 847 F.2d 325, 328 (6th Cir.), *cert. denied*, 109 S.Ct. 116 (1988).

VIII. Trial Court Vouched for Prosecutor.

All defendants except Scott contend the trial court abused its discretion in failing to grant a mistrial on the basis that the court vouched for the credibility of the prosecution when, in response to a request by counsel for defendant Ware that she be allowed to verify after each day of trial that each exhibit admitted that day was actually received in evidence, the court said it would rely on the honesty of the prosecutor and denied counsel's request.

"The decision to order a mistrial rests in the trial court's discretion." *Hamm* v. *Jabe*, 706 F.2d 765, 767 (6th Cir. 1983).

During the direct examination of Al Meredith, Sr., the prosecution moved to admit certain documentary evidence. Counsel for one defendant asked permission to examine the documents. It was revealed that not all defense counsel were given a copy of the prosecution's proposed exhibits; instead, the exhibits were delivered to Migdaleck's attorney to circulate among defense counsel. The court required the prosecution to provide each defendant with a copy of all the exhibits. Counsel for defendant Ware then inquired if counsel could, after each day of trial, verify that each admitted exhibit was used.[3] The court said:

> I am going to rely on the United States attorney to be honest. He always has been. He always will be.

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[3] Counsel for defendant Ware explained at oral argument that "used" meant "received."

(Nos. 88-1953-56;2031;2110)

Outside the presence of the jury, defendants moved for mistrial asserting the court vouched for the credibility of the prosecution. The court denied the motion.

As the Supreme Court said in *Glasser* v. *United States*, 315 U.S. 60 (1942), *reh. denied*, 315 U.S. 827 (1942):

> Perhaps the court did not attain at all times that thoroughgoing impartiality which is the ideal, but our examination of the record as a whole leads to the conclusion that the *substantial rights of the petitioners were not affected.* The trial was long and the incidents relied on by petitioners few. We must guard against the magnification on appeal of instances which were of little importance in their setting.

Id. at 83. (Citations omitted; emphasis added.)

This was an isolated comment in a rather lengthy trial and the comment was made during a general discussion regarding the identification and introduction of the prosecution's exhibits. Moreover, the court, in its instructions to the jury, favorably commented upon the professionalism of every attorney. We do not think the cited comment by the trial court denied defendants a fair trial.

We **AFFIRM.**

Appendix B

United States of America vs

Anders Nigdaleck
15700 Glenwood
Southfield Village, MI 48076

United States District Court for the
EASTERN DISTRICT OF MICHIGAN

88-CR-80012-DT-01

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on the date September 9, 1988

___ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

X WITH COUNSEL Thomas A. Howard (Retained)

PLEA

___ GUILTY, and the court being satisfied that there is a factual basis for the plea. ___ NOLO CONTENDERE ___ NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of ___ NOT GUILTY. Defendant is discharged
X GUILTY.

Defendant has been convicted as charged of the offense(s) of Mail Fraud; 18:USC:1341.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Counts: 3,4,5 and 6 - Defendant is committed to the custody of the Attorney General for a period of five (5) years on each count. Each count is to run consecutive to each other, for a total of 20 years.

Counts: 7,8,9,13,14 and 23 - Defendant is committed to the custody of the Attorney General for a period of five (5) years on each count Each count is to run concurrent with each other and to the sentence imposed on Counts 3,4,5 and 6.

SPECIAL CONDITIONS OF PROBATION

Further, defendant is to pay $1,000. on each of the ten counts for a total of $10,000.00.

Also, as to Count 23 restitution is ordered for $161,127.00 which is to be paid at a rate of $268.55/monthly to begin 30 days of release.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends defendant was placed in custody immediately following sentencing.

It is ordered that the Clerk shall deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

X U.S. District Judge

9-13-88

DATE

BEST AVAILABLE COPY

Appendix C

NO. 88-1956

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Filed: May 1, 1990)

UNITED STATES OF AMERICA,
Plaintiff-Appellee

vs. ORDER

ANDERS MIGDALECK,
Defendant-Appellant

BEFORE: NELSON and RYAN, Circuit Judges; MEREDITH, District Judge*

This matter is before the court upon consideration of the appellant's petition for rehearing of the court's March 7, 1990 opinion, affirming the decision of the district court.

Having carefully examined the petition and the record, the court finds it missaprehended no question of law or fact in its opinion.

It is therefore ORDERED that the petition be, and it hereby is, denied.

ENTERED BY ORDER OF THE COURT
(s) Leonard Green, *Clerk*

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* The Honorable Ronald E. Meredith, United States District Judge, Western District of Kentucky, sitting by designation.